QUESTIONS PRESENTED

1. Whether the Final Land and Resource Management Plan, and Final Record of Decision, for the Wayne National Forest authorize activities that "harm" plaintiffs sufficiently to satisfy the standing requirements of Article III of the United States Constitution?

2. Whether plaintiffs' challenges to the Final Land and Resource Management Plan, and Final Record of Decision, for the Wayne National Forest are ripe for judicial review?

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INTERESTS OF AMICI CURIAE[1]

Amicus Forest Service Employees for Environmental Ethics (FSEEE) is a not-for-profit membership organization with over 9,000 members concerned with proper implementation of environmental laws on our nation's forests. Amicus Zane G. Smith is a retired employee of the Forest Service and former Regional Forester for Region V, which includes all of the national forests in California. Mr. Smith also served as Director of Recreation Management in the Washington, D.C., office of the Forest Service.

Amici are in a unique position to advise the Court on the forest planning process. Mr. Smith has extensive experience with the Forest Service planning process through his prior employment as a Regional Forester. As Regional Forester for Region V of the Forest Service, Mr. Smith was responsible for final approval of all forest plans developed by national forests within the Region.

Forest Service Employees for Environmental Ethics works on a regular basis with forest planners and other professionals within the Forest Service. FSEEE attempts to provide some measure of protection for forest planners who are subject to political and economic pressure to

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[1] The parties have consented to the filing of this brief, and their written consent forms are being filed with this brief. Pursuant to Supreme Court Rule 37.6, counsel for amici hereby certifies that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, has made a monetary contribution to the preparation and submission of this brief.

skew forest plans in favor of development and away from the requirements of the National Forest Management Act.

STATEMENT OF THE CASE

Amici agree with, and hereby incorporate by reference, the Statement of the Case set forth in the brief of Respondents Sierra Club, et al.

SUMMARY OF ARGUMENT

Forest plans contain decisions that can only be made at the forest level, and that *must* be adhered to in subsequent project-specific decisionmaking. These decisions are made after interdisciplinary teams assess multiple resources on a forestwide, ecosystem basis. Such assessments cannot and do not occur at the project level.

Forest plans become effective upon adoption, and decisions made in those plans have both substantive and procedural impacts. Plans have immediate substantive impacts because they authorize activities that may be implemented without additional site-specific decisionmaking. For activities that do involve some level of additional site-specific consideration, forest plans affect how those activities will be carried out. Such activities often begin almost immediately after plan adoption.

Forest plans also have immediate procedural impacts. Decisions made in forest plans are not revisited or questioned in later site-specific decisionmaking. If legally required procedures are not followed in adopting

a forest plan, or if information required to be disclosed and considered in a forest plan is not disclosed and considered, such procedural violations cannot and will not be cured in later site-specific decisionmaking.

Withholding judicial review of challenges to forest plans until after site-specific decisions are made would undermine the planning process and result in "piecemeal" litigation that is disfavored by this Court. If plan-level decisions are revisited on a post-hoc, project by project basis, the integrity and reliability of the planning process and of forest plans themselves will be seriously undermined. Forest Service personnel need to know that the forest plans that are integral to their day-to-day management of the forest can pass judicial muster. This is particularly true in larger (mostly western) national forests, where hundreds of projects that are tiered to a particular provision in a forest plan may be undertaken simultaneously. A successful challenge to just one of these site-specific projects, based on the inadequacy of a plan-level decision, would put the remaining projects in jeopardy, regardless of their stage of development. If forest plans are to be subject to judicial review, review should occur *before* the plan is implemented, and not after projects and investments based on the plan have already begun.

Challenges to final forest plans are "ripe" for judicial review as soon as the plans are adopted. Once forest plans have been adopted, the decisions made in the plans are not revisited. The Final Land and Resource Management Plan and Record of Decision for the Wayne National Forest are just what they purport to be – final. And

because implementation of forest plans begins immediately after adoption, to the extent the plans fail to comply with legal requirements, they have immediate impacts that occur throughout the forest.

ARGUMENT

I. Forest Plans Contain Final Decisions Affecting a Wide Spectrum of Activities That Can Only Be Evaluated at the Forest Level

Forest plans such as the Wayne National Forest Plan embody final decisions with "imminent" environmental consequences throughout the forest. As stated in the Wayne National Forest Plan:

> Management direction contained in Chapter 4 of the Forest Plan will be used to analyze *any* proposal involving use of National Forest System lands. *All* permits, contracts, and other instruments for occupancy and use of the National Forest System lands *must* be consistent with the management direction in Chapter 4.

Record of Decision, Final Environmental Impact Statement, Land and Resource Management Plan, Wayne National Forest (hereinafter ROD) at 39 (emphasis added).[2] *See also* 16 U.S.C. § 1604(i) (subsequent activities must be consistent with plans); 36 C.F.R. § 219.10(e) (same). As the Forest Service admits, "the agency's adoption of a forest plan can be expected to have a significant

[2] The Solicitor General has lodged copies of the Wayne Plan, EIS, and Record of Decision with the Court.

effect on the nature and extent of subsequent timber harvesting activities. . . . " Brief for Federal Respondents at 15.

The finality and immediacy of plan-level decisions are not only expressly stated in the plan – they are dictated by the nature of the forest planning process. Forest plans represent the only opportunity for Forest Service decisionmakers to consider the cumulative impacts of interrelated activities on multiple resources across the landscape of the forest.[3] Because cumulative impacts and forest-wide consequences are addressed in forest plans, these impacts are *not* typically addressed in subsequent, site-specific proposals. *See* 16 U.S.C. § 1604(i) (project level decisions "shall be consistent" with land management plans). Decisions about appropriate levels of timber harvest, classification of lands, and the "universe" of management tools that will be made available

[3] The National Forest Management Act (NFMA) recognizes this fact, and directs the Forest Service to "use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences." 16 U.S.C. § 1604(b). The regulations implementing the NFMA require that "[r]egional and forest planning will be based on the following principles: . . . Recognition that the National Forests are ecosystems and their management for goods and services requires an awareness and consideration of the interrelationships among plants, animals, soil, water, air, and other environmental factors within such ecosystems." 36 C.F.R. § 219.1(b)(3). Plans are to be developed by interdisciplinary teams, which "shall consider problems collectively, rather than separating them along disciplinary lines." 36 C.F.R. § 219.5(a).

for future site-specific projects can *only* be made at the forest plan level.[4]

Forest plans determine, for example, which lands within the forest are "suitable" for timber harvest. *See* 36 C.F.R. § 219.14; Land and Resource Management Plan for the Wayne National Forest (hereinafter "Wayne Plan") at 4-7 (identifying 126,107 acres out of the 176,787 acre forest as "suitable" for timber production). Once lands have been classified as "suitable" for timber production, this decision is not typically revisited in subsequent project-specific decisions, and the lands are *not* considered for alternative uses, such as wilderness, that would exclude timber production.[5]

If a forest plan determines that certain lands are suitable for timber management on the basis of an illegal criterion (such as a seven year time limit for reforestation rather than a five year time limit – *see Sierra Club v. Cargill*, 11 F.3d 1545, 1547 (10th Cir. 1993)), that decision is both ripe *and* causes immediate harm. It is ripe because

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[4] Because decisions with respect to individual timber sales are not made in forest plans, the legality of such sales is separate from, but dependent on, the legality of the forest plan. The question of whether equitable relief granted for an inadequate forest plan should include specific timber sales would require a fact based inquiry. Such an inquiry would examine questions such as the extent to which a particular sale relied on the illegal components of the plan.

[5] In contrast, lands designated as *not* suitable for timber production are reviewed (at the forest level) at least every ten years to determine whether "changed circumstances" have made them "suitable" for timber production. 36 C.F.R. § 219.4(d).

it is final and not typically revisited in subsequent project level decisions. And it is immediately harmful because the *amount* of timber that is logged in every subsequent year is based on the plan's determination of the total suitable acreage available. Even if the land on which a specific sale occurs meets the "legal" five year time limit, the *amount* of that logging is based upon an overall harvest figure that has been improperly inflated using an illegal criterion in the forest plan.

Another type of decision made in forest plans and not revisited in later projects is the decision as to which management techniques will be used within a forest, and which will not. For example, Appendix B of the Wayne Plan identifies a finite list of "management indicator species" to be used as a basis for "evaluat[ing] overall effects of management activities." Wayne Plan at B-1.[6] The decision to select a particular species as an "indicator species" at the plan level has immediate consequences. It means that other species will *not* be used as indicator species, absent unusual circumstances or an amendment to the Plan. "Monitoring" begins immediately for species selected as "indicator" species in the plan, and monitoring does *not* begin, or occur at all, for species not selected as indicators. There is no provision in the NFMA, its implementing regulations, or the Wayne Plan for selecting a more appropriate indicator species on a site-specific

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[6] The selection of "management indicator species" is required by the regulations implementing the NFMA, in order to meet the NFMA's mandate that the Forest Service "provide for diversity of plant and animal communities." 16 U.S.C. § 1604(g)(3)(B); 36 C.F.R. § 219.19(a)(1).

basis. Selection or exclusion of a species as an indicator species typically occurs only at the plan level, yet it has a direct effect on subsequent decisions.

Forest level decisions that affect wildlife vary from forest to forest, but they are among the most important decisions made in forest plans. A forest-wide wildlife protection scheme intended to meet the needs of an elk herd that ranges over the entire forest, for example, must look at whether the herd's needs are met in each watershed within the herd's range. Individual timber sales occurring in those watersheds may seem insignificant when considered in isolation, but may have a profound cumulative effect on the survival of the elk herd. The forest plan establishes the forest-wide protection scheme, and is the only venue where the adequacy of the scheme can be analyzed or challenged.

As we explain in greater detail in Part V of this brief, *infra*, this Court has consistently recognized a distinction between "definitive" agency actions, which are reviewable even if not yet implemented, and "tentative" agency decisions, where premature judicial review would deprive an agency of the opportunity to refine its position. *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136, 151 (1967). The Wayne Plan decisions challenged in this case are plainly "definitive," both as a legal and as a practical matter.

II. The Substantive Injuries Caused by Noncomplying Forest Plans Are "Imminent"

Because decisions made in forest plans are not revisited at the site specific level and site specific decisions *must* comply with the Forest Plan (*see* ROD at 39; 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e)), plan-level decisions have consequences that are not dependent on subsequent decisionmaking to take effect. These consequences occur in every post-plan project affected by the decision, and are therefore "imminent" for standing purposes. *See* 36 C.F.R. § 219.10(e) (plans shall be implemented "as soon as practicable" after approval); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, n.2 (1992) (harm is "imminent" for Article III standing purposes when "injury is certainly impending.")

The "pine warbler," for example, is assigned as an indicator species by the Wayne Plan for determining the impacts of timber sales only on the health of "conifer" forests. *See* Wayne Plan at B-3. Timber sales in "early hardwood" forests that occur subsequent to plan adoption will *not* use pine warblers as an indicator species, because the Wayne Plan assigns "ruffed grouse" as an indicator species for hardwood forests. *Id.* If pine warblers are the best indicators of the impacts of sales in hardwood forests, and are in decline, that critical fact will be ignored in site-specific decisions because those decisions will assume, as dictated by the forest plan, that ruffed grouse are the species to examine as an indicator of the health of hardwood forests.

Forest plans thus reflect not only decisions to take certain actions, but also decisions *not* to take other

actions. The project schedules and budgets for a forest simply will not include actions that have been deemed through the forest planning process *not* to "best provide opportunities for accomplishing the Forest Plan management direction" or to "achiev[e] the desired future condition." Wayne Plan at 5-1. The Wayne Forest's monitoring processes, for example, include tracking "[p]opulation trends of the management indicator species" and their relationship to habitat changes. Plan at 5-8. As soon as the Plan was issued, activities that could affect other species not on the list of "indicator" species began – and the decision not to monitor and protect those species and their habitat was "implemented." A citizen who argues that other species should have been included in this list presents the court with immediate, substantive, harm and a "ripe" challenge – one that will become no more ripe as time goes by.

This Court has held challenges to government "inaction" to be ripe in other similar contexts. In *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 142 (1939) the Federal Communication Commission "refus[ed] to change an existing situation" and "allowed a practice to continue." The FCC argued that such inaction is not subject to judicial review, but the Court rejected this theory. *Id.* Seven years later Congress specifically provided in the APA that the courts have jurisdiction to review agency *failure* to act as well as specific actions. 5 U.S.C. § 551(13) (defining agency "action" as including the "failure to act."). In 1969 this Court, citing *Rochester Telephone*, reaffirmed that an agency's decision to "maintain[ ] the status quo" is just as reviewable in court as an affirmative act by the agency. *See City of Chicago v. United*

States, 396 U.S. 162, 166-67 (1969). In *City of Chicago* the plaintiffs sought judicial review of a decision by the Interstate Commerce Commission not to investigate certain rail carriers' changes in passenger rail service. The Court made clear that, as in *Rochester Telephone*, where the plaintiff is arguing that the agency *should* be taking certain actions but is not, judicial review is appropriate. *Id.* That is true of forest plans, such as the Wayne Forest Plan, which decide *not* to adopt some sets of management options at the same time that they decide *to* adopt another set of options (for example, electing to use certain wildlife species as "indicators" and not others). Such decisions not to act are just as final, and have environmental consequences that are just as real, as any decision to sell a particular timber sale.

III. Noncomplying Forest Plans Cause Immediate Procedural Injury

Forest plans not only embody final substantive decisions that have environmental consequences that will not be altered by subsequent site-specific decisionmaking; forest plans also are developed through mandatory procedures not replicated in future site-specific decisionmaking. The agency's failure to comply with these procedural requirements causes immediate injury to the intended beneficiaries of the requirements. As this Court stated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 n.7 (1992):

> There is much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for

> redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

See also Watt v. Energy Action Educational Foundation, 454 U.S. 151, 162 (1981) ("We share California's confidence that, after experimentation, the Secretary would use the most successful bidding system . . . For this reason, we agree with California that it has standing to challenge the Secretary of the Interior's refusal to experiment with non-cash bonus bidding systems.").

Petitioner's argument that "[a] decision that too much land has been designated as suitable would not provide any assurance that any particular area will be switched from the suitable to the unsuitable class . . . " (Petitioner's Brief at 15) ignores this Court's recognition, in *Lujan, supra*, and *Watt, supra*, that noncompliance with procedural requirements creates harm sufficient for standing, irrespective of the final outcome of the required procedure.[7] The assumption that better procedures in decisionmaking will lead to better substantive decisions

[7] Procedural injury in the NEPA context occurs not only when an agency fails to prepare an EIS for a proposal that may have significant effects on the environment, but also when an agency prepares an EIS that fails to meet NEPA's procedural requirements for such documents.

underlies both the procedural requirements that Congress has imposed on the Forest Service, and this Court's discussions of how standing should be analyzed when agencies violate procedural requirements.

IV. Piecemeal Revisitation of Final Decisions Made in Noncomplying Forest Plans Will Disrupt Management of National Forests, and Will Not Remedy the Harm Caused by Noncomplying Plans

Petitioners suggest that forest plans can be amended if site-specific challenges to activities authorized in a plan reveal that the plan is deficient. *See* Brief for Petitioner at 9 ("judicial review can encompass any portions of the Forest Plan relied upon or applied in a particular timber sale decision."). Even if this was a possibility, the result of such an approach would be not only chaos in the forest planning process, but also piecemeal judicial review of a type that this Court has specifically discouraged. *See Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 764 (1989) (piecemeal litigation is "strongly disfavored"); *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 570 (1983) (noting a "general judicial bias against piecemeal litigation."). Hundreds of decisions that rely on forest plans are initiated almost as soon as plans are completed. A successful challenge to just one site-specific project, based on a plan provision relied upon by other projects, would jeopardize each project, regardless of its stage of development or level of investment. Such an approach could paralize the national forest planning process.

Forest plans are to be accompanied by Environmental Impact Statements (EIS's) prepared pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(d). *See* 16 U.S.C. § 1604(g)(1); 36 C.F.R. §§ 219.7(b), 219.10(b). Waiting for site-specific proposals before challenging plan level decisions would also result in piecemeal NEPA litigation. This would undermine the purposes of NEPA. The regulations of the Council on Environmental Quality (CEQ) anticipate an orderly "tiered" process, in which larger landscape issues are considered in programmatic EIS's and site-specific impacts are considered only in subsequent, less comprehensive, NEPA documents that are tiered to the forest plan EIS. *See* 40 C.F.R. §§ 1500.4(i), 1502.20. As this Court has recognized:

> [i]f environmental concerns are not interwoven into the fabric of agency planning, the "action-forcing" characteristics of § 102(2)(C) [the EIS requirement] would be lost. "In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning. . . . As a result . . . enhancement opportunities may be foregone and unnecessary degradation incurred." S. Rep. No. 91-296 . . . at 20. For this reason the regulations of the Council on Environmental Quality (CEQ) require federal agencies to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values. . . . "

Andrus v. Sierra Club, 442 U.S. 347, 350 (1979). "NEPA procedures must insure that environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken." 40 C.F.R.

§ 1500.1(b) (emphasis added). *See also* 40 C.F.R. §§ 1500.5(a), (f), 1502.5. "The purpose of an EIS is to apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at a time when they 'retain[ ] a maximum range of options.' " *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1986). Thus, NEPA requires that an EIS be prepared "at an early stage when alternative courses of action are still possible." *Port of Astoria v. Hodel*, 595 F.2d 467, 478 (9th Cir. 1979).[8]

Postponing judicial review of plan-level decisions not only results in impractical and wasteful piecemeal judicial review – it also affects the objectivity of the ultimate site-specific decision. Justice Breyer has recognized as a First Circuit judge "the difficulty of stopping a bureaucratic steam roller, once started." *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (citing *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1156-58 (9th Cir. 1988); *Sierra Club v. United States Forest Service*, 843 F.2d 1190 (9th Cir. 1988); and *Save the Yaak Committee v. Block*, 840 F.2d 714, 722 (9th Cir. 1988)). Justice Breyer urged courts to "realize [an] important fact of administrative life: . . . as time goes on, it will become ever more difficult to undo an improper decision (a decision that, in the presence of adequate

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[8] The requirement that environmental analysis occur early in project planning is especially important when an agency prepares a programmatic EIS, such as the one for the Wayne National Forest Plan. Because of the long-term and large-scale repercussions of programmatic NEPA analysis, such analysis must be performed *prior* to irretrievable commitments of resources. 40 C.F.R. § 1502.2(f).

environmental information, might have come out differently)." *Sierra Club v. Marsh, supra*, 872 F.2d at 503.[9] Amici parties can confirm both the truth and the wisdom of these statements based upon their personal experiences within the Forest Service.

V. The Imminence of Harm From Adoption of Forest Plans Is Highlighted by Applying This Court's Tests for Ripeness

This Court has previously noted that "[t]he standing question . . . bears close affinity to questions of ripeness – whether the harm asserted has matured sufficiently to warrant judicial intervention." *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975). In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), this Court stated that ripeness "is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Although the *Abbott Laboratories* plaintiffs were challenging a new rule governing drug labeling before the agency had attempted to enforce the rule, the Court found that the rule was ripe for judicial review, because the issue was fit for judicial decision and there would be hardship to the plaintiffs if judicial review was withheld. 387 U.S. at 149, 87 S. Ct. at 1516. The same is true for

[9] Although *Marsh* dealt with the availability of injunctive relief for NEPA violations, *Marsh's* reasoning is directly applicable to the instant case, where the agency is asking this Court to delay judicial review of a forest plan until a site-specific action is challenged, and to allow the plan to be implemented in the interim.

forest plans. The plans are final and therefore "fit" for judicial review, and withholding judicial review would create hardship for *all* parties – including the Forest Service.

Requiring plaintiffs to challenge each of the Forest Service's site-specific actions instead of bringing this programmatic challenge, as the Forest Service and intervenors would have plaintiffs do, would impose a hardship both on the parties and on the judicial system. It would be virtually impossible for citizens and public interest groups to challenge each Forest Service action that they believe violates the law. In *Sierra Club v. Penfold*, 664 F. Supp. 1299, 1305 (D. Alaska 1987), *aff'd*, 857 F.2d 1307 (9th Cir. 1988), the court held that a challenge to "a longstanding and completely uniform BLM practice of approving [mining] operations under Plans of Operations without assessing their cumulative impacts" was ripe and reviewable on a programmatic level:

> Administrative appeal would not be practical; to obtain the relief they seek administratively, plaintiffs would have to file appeals on every mine approval in the Birch Creek watershed. This would impose some hardship on plaintiffs and delay relief. In contrast, the court can dispose of this claim in a single proceeding. Operating from a manageable factual record relating to broad rather than local impacts, the court is asked to rule on a broad legal question.

Id.

For purposes of conserving the resources of both the courts and the parties, it clearly makes sense to review plaintiffs' programmatic challenge. *See, e.g., Longview*

Fiber Co. v. Rasmussen, 980 F.2d 1307, 1313 (9th Cir. 1992) ("bifurcation of review is undesirable"); *Public Citizen Health Research Group v. Commissioner, Food and Drug Admin.*, 740 F.2d 21, 31 (D.C. Cir. 1983) ("[T]he integrity of the administrative process is threatened by piecemeal review"); *State of Montana v. Johnson*, 738 F.2d 1074, 1076 (9th Cir. 1984) (early interpretation of FLPMA would avoid wasting administrative resources). Postponing review of plan-level, programmatic decisions would plainly create "hardship," both for the plaintiffs and for the Forest Service.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court affirm the ruling of the Sixth Circuit that plaintiffs have standing to seek judicial review of the Final Land and Resource Management Plan, and Final Record of Decision, for the Wayne National Forest. Amici also request that the Court affirm the Sixth Circuit's ruling that the Plan and ROD are ripe for judicial review.

Respectfully submitted,

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